ENCORP ISKANDAR DEVELOPMENT SDN BHD v. TEO CHOON POH (ZHANG CHUNBAO) & ORS

COURT OF APPEAL, PUTRAJAYA
HASHIM HAMZAH JCA
AZIMAH OMAR JCA
ISMAIL BRAHIM JCA
[CIVIL APPEAL NO: B-02(NCvC)(W)-779-04-2022]
27 AUGUST 2025

Abstract – *Where there is ambiguity in the terms of an agreement, the law would necessarily pave a path for the parties to look at and consider the factual matrix surrounding the agreements so as to shed light to reasonably ascertain the parties' actual intent and mutual covenant. In this case, regarding whether the developer has breached its contractual covenant under the Developer Interest-Bearing Scheme ('DIBS'), the developer's own conduct of continuing to service the progressive interest payment jived perfectly with the purchasers' narrative that the parties have always understood and agreed that the DIBS period is not limited to the 48 months' 'contract period' to deliver vacant possession. Supported by numerous documents from the financiers and even the developer's own signed acknowledgment, the developer is contractually required to bear progressive interest under the DIBS scheme up until the delivery of the vacant possession proper (beyond the 48 months' contract period in case of delays).*

CONTRACT: *Agreement – Construction – Developer Interest-Bearing Scheme ('DIBS') – Ambiguity of terms – Determination on term 'construction period' – Whether construed as limited to 48 months period to deliver vacant possession or to cover entire period of time taken to fully construct and develop parcels and deliver vacant possession – Whether DIBS scheme covered entire period of construction until delivery of vacant possession – Whether DIBS period limited to 48 months' contract period – Whether estoppel lay in benefit of purchasers to bar developers from negating its previous admissions by conduct – Whether developer contractually required to bear progressive interest under DIBS until delivery of vacant possession proper*

This was an appeal against the decision of the High Court allowing the claim of the purchasers ('respondents') against the developer ('appellant') in view of the appellant's breach of its contractual covenant under the Developer Interest-Bearing Scheme ('DIBS'). The fulcrum in which the entire case swung rested on the singular determination on the appropriate manner in which the term 'construction period' ought to be construed, *ie*, whether it

should only be limited to the 48 months period to deliver vacant possession ('contract period') or should it mean to cover the entire period of time taken for the appellant to fully construct and develop the parcels and deliver vacant possession to the respondents (inclusive of delays) ('VP period'). The appellant was the developer of a strata project ('project'). The respondents entered into their respective sale and purchase agreement ('SPAs') with the appellant to purchase their respective parcels in the project. The project ran during the time of the DIBS regime whereby developers at the time would offer the scheme as a fetching incentive to promote the sale of their development. Simultaneous to the signing of the SPAs, the appellant had drawn up letters for the purchasers to respond and select their preferred mode of incentive – either to take up the DIBS scheme or to opt for an immediate 3% rebate of the purchase price ('DIBS agreement'). The appellant was supposed to deliver vacant possession between the years 2016 and 2017. However, the appellant only issued the notice to deliver vacant possession in 2018. The appellant was unable to adhere to the 48 months' contract period to deliver the vacant possession within time. Despite the lapse of the 48 months' contract period, the appellant continued to bear the burden to pay the progressive interest instalments. The appellant (i) insisted that the 'construction period' only ran for 48 months on the bare basis that the SPAs all clearly stipulated that vacant possession must be delivered within the 48 months' contract period; (ii) wrote to its financiers that the appellant had 'overpaid' the progressive interest even after 48 months *via* a notice ('belated overpayment notice'); and (iii) issued tax invoices against the respondents for the refund of the overpayment of progressive interests. The respondents contended that the 'construction period' must necessarily refer to the entire time which the appellant had taken to fully construct the parcels and thereafter properly deliver vacant possession to the purchasers. The respondents, however, submitted that if they were to protest against the refund claimed, the respondents would be denied physical possession and occupation of their units. The respondents had no other option but to accede to the appellant's claim for refund. It was on this landscape that the respondents' claim first came before the High Court. High Court identified that the consistent 'omission' to 'limit' the DIBS period to 48 months was premised on the appellant's own admission, agreement, acknowledgment, and outright personal knowledge that the DIBS period shall run beyond 48 months if vacant possesion was unable to be delivered within the 48 months' contract period. This was evinced by the appellant's own signing and execution of end financing agreement with UOB Bank ('UOB end financing agreement') in which the appellant had expressly and literally co-signed and agreed on the express term that the appellant was liable for the servicing of the progressive interest on behalf of the borrower(s) during the construction of the property and until the expiry of the vacant possession stage. The High Court allowed the respondents' claim and found the

appellant liable under the DIBS scheme to bear the progressive interest beyond the 48 months' contract period and until the delivery of the vacant possession proper. Hence, this appeal. The issue that arose herein was whether the High Court was correct to find that the appellant was contractually required to bear progressive interest under the DIBS scheme up until the delivery of the vacant possession proper (beyond the 48 months' contract period in case of delays).

Held (dismissing appeal)
Per Azimah Omar JCA delivering the judgment of the court:

(1) All of the financiers' letters of offer for the DIBS scheme either did not at all mention of a 48 months' time limit, or instead expressly mention of time transcending beyond the 48 months' contract period and inclusive of delays until the delivery of the vacant possession proper. There was also the UOB end financing agreement in which the appellant unequivocally signed and agreed that the appellant shall bear the progressive interest '... until the expiry of the vacant possession stage'. Considering the ambiguity of the appellant's drafting of the DIBS agreement, this court must necessarily look into the surrounding facts so as to ascertain the true intention of the parties. Not only that, the *contra proferentem* rule appropriately should apply as against the appellant as the party who drafted the DIBS agreement. (paras 32 & 33)

(2) The DIBS agreement must necessarily be interpreted to the benefit of the respondents, in that the appellant was responsible to serve the progressive interest up until the actual delivery of vacant possession proper inclusive of any delay(s). Paired with contemporaneous documentary evidence, it was only legally reasonable that the parties, especially the appellant, would have understood and agreed that the DIBS scheme would necessarily cover the entire period of construction up until the delivery of vacant possession (and not merely limited to the 48 months' contract period). (para 34)

(3) It is a pertinent rule of contractual interpretation that contracts must yield to business common sense. It did not make any business common sense to offer distinct incentives of an immediate rebate and a gradual savings *via* the DIBS scheme if the end result would be the same. If that shall be the case, then opting for the DIBS scheme would certainly be an absurd decision. Why would anyone of sound business mind, opt to be kept out of immediate lump sum rebate if the alternative gradual saving would lead to the exact same rebate amount? It only made business common sense to offer the DIBS scheme as an alternative to a lump sum rebate if the DIBS scheme would offer greater savings in the long run, or in the case there were further delays beyond the 48 months' contract period. (para 35)

(4) The appellant was arbitrarily shifting the goalpost as and when it fancied. When it was beneficial to the interest of the developer, the DIBS period should follow the actual time and period that the vacant possession was delivered. However, as and when it was beneficial to the interest of the purchasers, the DIBS period should follow the 48 months' contract period stipulated under the SPAs. By the appellant's self serving interpretation, the appellant should reap positive benefits in both instances where the appellant performed dutifully and performed abysmally. The appellant's approbating and reprobating its own stance could not be condoned. (paras 36 & 37)

(5) It was relevant to consider the appellant's conduct of continuing to service the progressive interests despite the lapsing of the 48 months' period together with the contemporaneous documentary evidence. That continued service and payment jived perfectly with the respondents' narrative that the parties have always understood and agreed that the DIBS period was not limited to the 48 months' contract period. (para 38)

(6) The respondent, who by default were with the lower bargaining power as against the developer, had not done anything to tilt the balance of power in a manner in which would 'force' the appellant's hands to continue serving the progressive interest beyond the lapsing of the 48 months' contract period. The appellant had done so without any pressure or undue insistence of the respondents. On the contrary, the respondents were put in an inequitable position by the appellant's inequitable conduct in forcing additional late payment charges, and delayed physical possession of the units (despite the accrual of the defect liability period) in which had cornered the respondents to accede to the appellant's claim for refund. The appellant had also acted inequitably by making a 'u-turn' against its own *status quo* which it had unequivocally and voluntarily subscribed to for years before suddenly issuing the belated overpayment notice. Thus, estoppel shall lie in the benefit of the respondents to bar the appellant from negating its previous admissions by conduct. (paras 41-43)

(7) The liquidated ascertained damages ('LAD') as a remedy was entrenched within the SPAs which was totally separate and distinct than that of the DIBS agreement. The respondents were not seeking to enforce the SPAs and instead were seeking to enforce the DIBS agreement. The entitlement under the DIBS scheme was not attached to or predicated upon the appellant's delay (unlike the LAD clause within the SPAs). Instead, it was predicated on the entire period of time the appellant took to complete the development and deliver vacant possession to the respondents. It had accrued even before the appellant had failed to adhere to the 48 months' contract period and continued to

accrue until the time the appellant properly delivered vacant possession to the respondents. The two distinct remedies under the SPAs and under the DIBS scheme was not at all of the same nature, purpose and design. Thus, the High Court was correct in finding that the appellant was contractually required to bear progressive interest under the DIBS scheme up until the delivery of vacant possession proper beyond the 48 months' contract period in case of delays. (paras 44 & 45)

Case(s) referred to:

Boustead Trading (1985) Sdn Bhd v. Arab-Malaysian Merchant Bank Bhd [1995] 4 CLJ 283 FC ***(refd)***

Cheah Theam Kheng v. City Centre Sdn Bhd (In Liquidation) & Other Appeals [2012] 2 CLJ 16 CA ***(refd)***

Cheng Chuan Development Sdn Bhd v. Ng Ah Hock [1982] CLJU 48; [1982] 1 LNS 48 FC ***(refd)***

Davanam Constructions Sdn Bhd v. THP Enstek Development Sdn Bhd [2024] CLJU 1204 HC ***(refd)***

Ho Yau Hong & Ors v. How Yaw Ming & Another Appeal [2023] CLJU 827; [2023] 1 LNS 827 CA ***(refd)***

Juahir Sadikon v. Perbadanan Kemajuan Ekonomi Negeri Johor [1996] 4 CLJ 1 CA ***(refd)***

Kandasami Kaliappa Gounder v. Mohd Mustafa Seeni Mohd [1983] 2 CLJ 55; [1983] CLJ (Rep) 7 ***(refd)***

Kuan Kong Hong v. Ng Kim Cheong & Anor [2023] CLJU 1541 [2023] 1 LNS 1541 CA ***(refd)***

Mandarin Pavilion Sdn Bhd v. Chang Vui Lun & Anor [2019] 2 CLJ 22 CA ***(refd)***

MMC Oil & Gas Engineering Sdn Bhd v. Tan Bock Kwee & Sons Sdn Bhd [2016] 4 CLJ 665 CA ***(refd)***

Phiong Khon v. Chonh Chai Fah [1970] CLJU 102; [1970] 1 LNS 102 FC ***(refd)***

Prenn v. Simmonds [1971] 3 All ER 237 ***(refd)***

Tindok Besar Estate Sdn Bhd v. Tinjar Co [1979] CLJU 119; [1979] 1 LNS 119 FC ***(refd)***

Vila Mekar Sdn Bhd v. Wong Yie Dee [2025] CLJU 1703 CA ***(refd)***

Legislation referred to:

Evidence Act 1950, s. 114(g)

Housing Development (Control and Licensing) Act 1966, Schedule H

For the appellant - Sanjay Mohan, Wong Li Wei & Jia Shen; M/s Sanjay Mohan
For the respondents - KL Wong & Wong Renn Xin; M/s KL Wong

[Editor's note: For the High Court judgment, please see Teo Choon Poh (Zhang Chunbao) & Ors v. Encorp Iskandar Development Sdn Bhd [2025] CLJU 185 (affirmed).]

Reported by Suhainah Wahiduddin

A

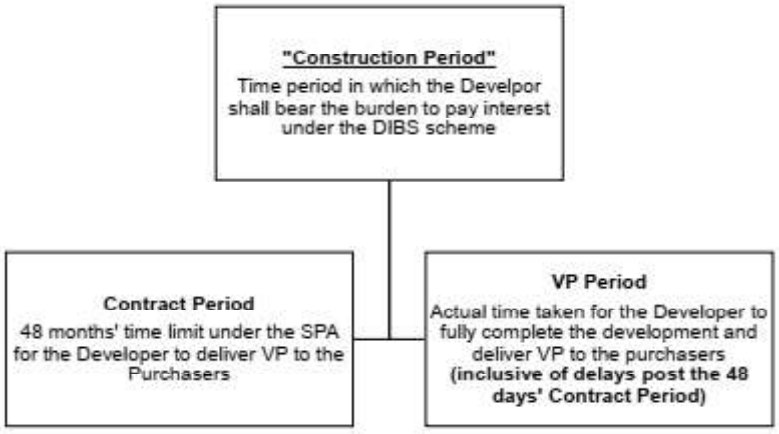
JUDGMENT

Azimah Omar JCA:

Introduction

B **[1]** The appeal before us is an appeal against the learned High Court Judge's ("learned judge") decision to allow the respondent-purchasers' claim against the appellant-developer in view of the developer's breach of its contractual covenant under the developer's interest-bearing scheme ("DIBS").

C **[2]** The fulcrum in which the entire case swings rests on the singular determination on the appropriate manner in which the term "construction period" ought to be construed (whether it should only be limited to the 48 months' period to deliver vacant possession ("contract period") or it should mean to cover the entire period of time taken for the appellant-developer to fully construct and develop the parcels and deliver vacant D possession to the respondents (inclusive of delays) ("VP period"):


"Construction Period"
Time period in which the Develpor shall bear the burden to pay interest under the DIBS scheme
Contract Period
48 months' time limit under the SPA for the Developer to deliver VP to the Purchasers
VP Period
Actual time taken for the Developer to fully complete the development and deliver VP to the purchasers (inclusive of delays post the 48 days' Contract Period)

E

F

G

[3] *Res ipsa* the namesake of the DIBS scheme, the appellant had contractually undertaken to bear the loan progressive interests payable by the purchasers (*via* monthly instalments) during the 'construction period'. Against abundant of contemporaneous documents that proved otherwise, the H appellant-developer insisted that the 'construction period' only ran for 48 months. The appellant insisted as such on the bare basis that the SPAs all clearly stipulated that VP must be delivered within the 48 months' contract period.

I

[4] On the contrary, supported by numerous documents from the financiers and even the appellant-developer's own signed acknowledgment, the purchasers contended that the 'construction period' must necessarily refer to the entire time which the developer had taken to fully construct the parcels and thereafter properly deliver VP to the purchasers (VP period).

[5] The respective parties also sought to rely upon each other's 'subsequent conducts' (post-contract) to shed some light on the ambiguity that arose from the developer's vague drafting of the SPA and the DIBS agreement. Against which the respondent-purchasers also argued that the *contra proferentem* rule shall also apply against the appellant-developer:

(i) developer's subsequent conduct:

the developer had continued to service the interest instalments even after 48 months as the developer had (as a separate breach) failed to complete and deliver the parcels within the prescribed 48 months' contract period; and

(ii) purchasers' alleged subsequent conduct:

when the developer arbitrarily pre-conditioned the delivery of VP with the 'reimbursement' of interests paid after the lapsing of the 48 months' contract period against the purchasers, some of the purchasers were forced to oblige the developer's claim for 'reimbursement' out of the developer's threat of compounding penalties and automatic accrual and lapsing of the defect liability period ("DLP").

[6] In any case, it is only apt for us to first appreciate and lay down the factual matrix that had culminated the appeal before us.

Factual Background

[7] Encorp Iskandar Development Sdn Bhd ("appellant/developer") was the developer of a strata project known as Encorp Marina Harbour ("the project"). *Circa* 2012 to 2013, The purchasers ("respondents/purchaser(s)") all entered into their respective SPAs with the appellant to purchase their respective parcels in the project.

[8] The project ran during the time of the DIBS regime whereby developers at the time would offer the scheme as a fetching incentive to promote the sale of their development. The project and the developer here were no exception.

[9] Simultaneous (or very proximate) to the signing of the SPAs, the appellant had drawn up letters for the purchasers to respond and select their preferred mode of incentive – either to take up the DIBS scheme or to opt for an immediate 3% rebate of the purchase price ("DIBS agreement"). All of the purchasers in this appeal opted for the DIBS agreement.

[10] To our mind, there must be a perceivable economic difference between the two modes of incentive lest the entire exercise of selection would be superfluous. It cannot be that the two different incentives should stand similarly tall and sit similarly low. Thus, the financial logic between the two must be that:

(i) opting for the upfront 3% rebate would give the benefit of an immediate financial discount on the purchase price (without having to wait for the 'incremental monthly discounts' *via* the DIBS scheme). However, opting for the upfront rebate would also mean that a purchaser would not be able to yield additional savings in case the developer had to continue bearing the interest in view of its inability to complete the project in the prescribed 48 months' contract period; and

(ii) opting for the DIBS scheme would not yield an immediate savings discount, although purchasers who opted for the scheme would stand to be secured or isolated from having to pay interest instalments (and earn additional savings or discounts) in the critical instance where the developer was unable to deliver on its promise to develop the project to its completion within the 48 months' contract period. This is the main allure of the DIBS scheme – in that the purchasers are relieved of any obligations to pay until the purchasers were able to physically possess and enjoy their respective units (upon delivery of VP).

[11] If in case the court were to accept the developer's narrative, then there would be no conceivable benefit to opt for the DIBS scheme as the net benefit of the scheme would be at the same position as the immediate 3% rebate.

[12] In any case, it was irrefutable that the appellant had drafted the DIBS agreement in a manner that was glaringly vague (in that the DIBS agreement did not mention at all of any stipulation as to time or period in which the developer was supposed to bear the interests). Nor did any of the SPAs specifically and clearly defined the 'DIBS period' (whether it should only cover the 48 months' contract period or the entire VP period).

[13] Interpretation *per se*, the appellant argued that there was no ambiguity as the SPAs (in adopting Schedule H of the Housing Development (Control and Licensing) Act 1966 had clearly stipulated (in the standard cls. 25 and 26) that VP must be delivered within 48 months from the date of contract. And by extension, somehow that stipulation should also extend to mean that the DIBS period must necessarily follow the 48 months' contract period (a supposition we must highlight to be baseless and too far-fetched). Although Schedule H stipulates a standard contract period of 48 months to deliver VP, there was nothing in Schedule H to stipulate that the DIBS period must necessarily follow the 48 months' contract period. In fact, Schedule H is entirely silent on any mention of any DIBS scheme (as it should be for the simple reason that the DIBS scheme is an incentive distinct and separate than

that of the SPAs). As a developer offering such incentive, it squarely falls on the developer's shoulders to appropriately draft and define the DIBS period in the DIBS agreement (which the developer clearly had failed to do).

[14] In light of the ambiguity, the law would necessarily pave a path for the parties to look at and consider the factual matrix surrounding the agreements so as to shed light to reasonably ascertain the parties' actual intent and mutual covenant (see Federal Court in *Phiong Khon v. Chonh Chai Fah* [1970] CLJU 102; [1970] 1 LNS 102; [1970] 2 MLJ 114):

> ... Monir on the *Principles and Digest of the Law of Evidence*, 4th Edition, page 576, under the heading of admissibility of surrounding circumstances to explain or interpret written contracts, grants and instruments other than wills has this passage:
>
> > *Where a deed of transfer raises an ambiguity as to the nature of the interest in the property it purports to convey, extrinsic evidence (including evidence as to the course of dealing with the property) may be taken into consideration in construing the deed*. If the question is whether the lease is perpetual or not, evidence as the surrounding circumstances is admissible, because it explains what, standing alone, is incapable of explanation – whether the grant is only to the person named in the lease or to him and his heirs. Where the document creating the tenancy is equivocal or ambiguous in its terms, the attendant circumstances must be taken into consideration.
>
> Under the head of court's power to construe and interpret a document in the light of surrounding circumstances is not affected by the rule in section 92 the author observes:
>
> > *Section 92, however, merely prescribes a rule of evidence; it does not fetter the court's power to arrive at the true meaning and effect of a transaction in the light of all the surrounding circumstances*. Thus, the Privy Council (*Ismail Mussajee Mookerdam v. Hafiz Boo* ILR 33 Cal 773; 10 CWN 570; 33 IA 186 PC) held a document which purported to be a deed of sale, to be a deed of gift, on a consideration of the circumstances under which it came to be executed.
>
> The agreement seems to be concerned with various matters. *It is extremely vague and ambiguous. Without hearing extrinsic evidence it is impossible to know what are the arrangements set out in the document*.
>
> (emphasis added)

[15] In fact, the law in recent times would even allow consideration of surrounding facts even if there was no ambiguity so as to yield a contract to 'business common sense' and to avoid absurdity (see *Prenn v. Simmonds* [1971] 3 All ER 237; *Kuan Kong Hong v. Ng Kim Cheong & Anor* [2023] CLJU 1541 [2023] 1 LNS 1541; [2023] 5 MLJ 644; *Davanam Constructions Sdn Bhd v. THP Enstek Development Sdn Bhd* [2024] CLJU 1204; [2024] MLJU 1280).

[16] Since the DIBS scheme would necessarily involve the side of financiers, it is crucial that the bargains struck between the appellant-developer and the respective financiers be appropriately examined. And this was exactly what the learned judge had done in the court below.

[17] We have taken the task to examine each and every financier's letters of offer with the appellant-developer (as the learned judge had also done) and we accordingly concur with the learned judge's identification that the offers all share the same consistent feature in that:

(i) there was only a clear reference to a "construction stage" or a "construction period" without any reference to a 48 months' limit in which the appellant-developer had covenanted to bear interest for (for RHB Bank, UOB Bank, and CIMB Bank); or

(ii) there was a clear and definite reference to a period up until the delivery of VP which the appellant-developer had covenanted to bear interest for (for Maybank and Public Bank).

[18] Thus, at this early juncture it was vividly clear that even the financiers all share the same understanding that the developer shall bear interests under the DIBS scheme for the entire period until the actual delivery of VP.

[19] We are aware that the offers *per se* were not exactly proof of an agreement. Nonetheless, it was the appellant-developer itself who was unwilling and reluctant to tender any evidence to the contrary (despite having its own witness (DW2) testifying that there were agreements penned down between the developer and the respective end-financiers). Against this outright failure and refusal to tender material evidence (that should obviously be within the developer's possession and records), an adverse inference under s. 114(g) of the Evidence Act 1950 ought to be drawn against the appellant (see *Juahir Sadikon v. Perbadanan Kemajuan Ekonomi Negeri Johor* [1996] 4 CLJ 1).

[20] It was astute of the learned judge to have identified that the consistent 'omission' to 'limit' the DIBS period to 48 months was in fact premised on the developer's own admission, agreement, acknowledgment, and outright personal knowledge that the DIBS period shall run beyond the 48 months if VP was unable to be delivered within the 48 months' contract period. This was evinced by the developer's own signing and execution of end financing agreement with UOB Bank dated 3 July 2012 ("UOB end financing agreement") in which the developer had expressly and literally co-signed and agreed on the express term that:

> (3) For DIBS applicable only during the Construction Period:
>
> - The Developer is liable for the servicing of the progressive interest on behalf of the borrower(s) during the construction of the property And Until The Expiry Of The Vacant Possession Stage.

[21] Thus, apart from the adverse inference drawn, it was abundantly clear before the court that there were compounding and corroborative contemporaneous documentary evidence that unequivocally supports the respondents' narrative that the DIBS period was not limited to cover only the 48 months' contract period (of which must necessarily carry heavier weight in probative value than that of mere oral evidence) (see Court of Appeal in *MMC Oil & Gas Engineering Sdn Bhd v. Tan Bock Kwee & Sons Sdn Bhd* [2016] 4 CLJ 665; [2016] 2 MLJ 428):

> In summary therefore we found that the learned judge, with respect, had *failed to give any or adequate consideration to contemporaneous documentary evidence* evidencing the nature of the relationship between the parties. *Instead undue (or erroneous) weight had been accorded to oral evidence which was in conflict with such contemporaneous documentary evidence.* Additionally, weight was accorded to portions of documents without a consideration of the evidence as a whole. In short there was judicial misappreciation of the evidence as a whole. These matters will be discussed in further detail below.
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> (emphasis added)

[22] Aside from (and additional to the contemporaneous evidence deliberated on above) the appellant's own subsequent conduct (post-lapsing of the 48 months' contract period) was also in clear alignment with the respondents' narrative. This was simply for the fact that even after the lapsing of the 48 months' contract period, the developer continued to service the progressive interest instalments on behalf of the respondents.

[23] It was admitted that the appellant was unable to adhere to the 48 months' contract period to deliver VP within time. The appellant-developer was supposed to deliver VP between the years 2016 and 2017 (depending on the exact date of the SPAs per each purchasers). However, the appellant only issued the notice to deliver VP on 25 January 2018 ("VP notice"). A suit was filed for liquidated ascertained damages ("LAD") due to the delay and was concluded *via* a settlement agreement in which the appellant agreed to pay LAD of RM11,693,927.25 to the respondents.

[24] Most intriguingly, despite the lapsing of the 48 months' contract period, the appellant continued to bear the burden to pay the progressive interest instalments. This was admitted by the appellant when the appellant had belatedly written to its financiers that the appellant had 'overpaid' the progressive interests even after 48 months *via* a notice dated 29 May 2017 ("belated overpayment notice").

[25] On even date, the appellant also (as an afterthought) issued a notice to the purchasers to inform the 'overpayment' and its intention to issue demands for 'refunds' for the excessive interest payments. This sudden and abrupt mention of the 48 months' limit only came about only five years after the initial issuance of the DIBS agreement.

[26] Following through with its intention, the appellant then issued tax invoices against the respondents for the 'refund' of the overpayment of progressive interests. This demand for refund was laced with a warning of recurring or additional interest or penalty on late payment against the respondents. Consistent with the appellant's warning, the appellant's VP notices also carried the similar warning that VP will only be delivered if and only if the respondents fully settle any 'outstanding' late payment charges. In fact, the appellant's own witness DW1 had admitted during cross-examination that the appellant would not have released the keys to any purchaser at who had not paid the 'refund' of the overpaid progressive interest.

[27] It was understandably pressing against the respondents to be forced into paying the refund claimed by the appellants considering:

(i) the respondents ideally would not want to run the risk of bearing heftier late payment charges; and

(ii) the respondents ideally would want to take physical possession of the keys to the units as the terms of the VP notice was that VP shall be considered delivered (and the defect liability period ("DLP") shall then accrue) 14 days from the receipt of the VP notice irrespective of whether or not the respondents had taken physical possession of their respective units.

[28] The respondents were caught between a rock and hard place. If the respondents were to protest against the refund claimed, then the respondents would be denied physical possession and occupation of its units. And considering the 14 days' notice period under the VP notice, the DLP can also run despite the fact that the respondents were still deprived of possession of their units. Thus, it is in the respondents' best interest to take physical possession of their units as early as possible (to check for defects) *albeit* the respondents would have to reluctantly and forcefully accede to the appellant's claim for refund. Otherwise, the respondents would run the risk of having less time to appropriately assess the make of the units and duly claim for defects within the DLP period.

[29] Considering the dilemma above, a majority of the respondents had no other options but to accede to the appellant's claim for refund (some with express protest and reservation).

[30] It is on the simple landscape of the facts above that the respondents' claim first came before the High Court's determination. On the same summations we have briefly addressed earlier under this heading, the learned judge had allowed the respondents' claim and found that the appellant was liable under the DIBS scheme to bear the progressive interest beyond the 48 months' contract period and until the delivery of VP proper.

The Appeal Before Us

[31] We have perused the memorandum of appeal, the High Court's grounds of judgment, the records of appeal and the parties' respective written submissions and we are of the view that appeal before us can be decided by determining the following singular issue:

> Whether the learned judge was correct to find that the appellant-developer was contractually required to bear progressive interest under the DIBS scheme up until the delivery of VP proper (beyond the 48 months' contract period in case of delays).

Issue: Whether The Learned Judge Was Correct To Find That The Appellant-Developer Was Contractually Required To Bear Progressive Interest Under The DIBS Scheme Up Until The Delivery Of VP Proper (Beyond The 48 Months' Contract Period In Case Of Delays)

[32] We can dissect and determine this singular issue firstly from the aspect of contemporaneous documentary evidence furnished before the court. As mentioned earlier, contrary to the appellant's belated overpayment notice, there was a plethora of documentary evidence proving the exact opposite of the appellant's supposition:

(i) all of the financiers' letters of offer for the DIBS scheme either do not at all mention of a 48 months' time limit, or instead expressly mentions of time transcending beyond the 48 months' contract period and inclusive of delays until the delivery of VP proper; and

(ii) UOB end financing agreement in which the appellant unequivocally signed and agreed that the appellant shall bear the progressive interest "... until the expiry of the vacant possession stage".

[33] Considering the ambiguity in the appellant's drafting of the DIBS agreement, we must necessarily look into surrounding facts so as to ascertain the true intention of the parties. Not only that, the *contra proferentem* rule appropriately should apply as against the appellant as the party who drafted the DIBS agreement (see Privy Council in *Kandasami Kaliappa Gounder v. Mohd Mustafa Seeni Mohd* [1983] 2 CLJ 55; [1983] CLJ (Rep) 7; [1983] 2 MLJ 85):

> Furthermore, there is a principle of construction that if a document *inter partes* contains an ambiguity which cannot otherwise be satisfactorily resolved, it is to be construed adversely to the party who proffered it for execution. *Neil v. Duke of Devonshire* (1882) 8 AC 135 149 *Norton on Deeds* 2nd Edition, page 127.

(see also Court of Appeal in *Mandarin Pavilion Sdn Bhd v. Chang Vui Lun & Anor* [2019] 2 CLJ 22; [2019] 3 MLJ 395):

> [18] It is our view that having applied the trite law of construction of statute, it is quite clear that the appellant had no contractual or statutory right to recover any GST liability from the respondent. Even if there is any ambiguity in cl. 25 of the SPA it did not help the appellant as the *contra proferentem* rule applied as it is not disputed that the sales and purchase agreement was prepared by the appellant. **The *contra proferentem* rule requires the court to construe any ambiguity in the contract document against the party which drafts the ambiguous document**.
>
> (emphasis added)

[34] Therefore, the DIBS agreement must necessarily be interpreted to the benefit of the respondents (in that the appellant was responsible to serve the progressive interest up until the actual delivery of VP inclusive of any delay(s)). Paired with the earlier mentioned contemporaneous documentary evidence, it is only legally reasonable that the parties (especially the appellant) would have understood and agreed that the DIBS scheme would necessarily cover the entire period of construction up until the delivery of VP (and not merely limited to the 48 months' contract period).

[35] Furthermore, as we have mentioned earlier, it is a pertinent rule of contractual interpretation that contracts must yield to business common sense. To our comprehension, it does not make any business common sense to offer distinct incentives of an immediate rebate and a gradual savings *via* the DIBS scheme if the end result would be the same. If that shall be the case, then opting for the DIBS scheme would certainly be an absurd decision. Why would anyone of sound business mind, opt to be kept out of immediate lump sum rebate if the alternative gradual saving would lead to the exact same rebate amount? This rhetorical question proves that the appellant's interpretation leads to absurdity. It only makes business common sense to offer the DIBS scheme as an alternative to a lump sum rebate if the DIBS scheme would offer greater savings in the long run (or in case there were further delays beyond the 48 months' contract period).

[36] Adding further absurdity in the appellant's interpretation was the appellant's contention that the appellant would have been entitled to cease bearing any further interest if in case the appellant was able to deliver VP before the expiration of 48 months. It seems that the appellant was arbitrarily shifting the goalpost as and when it fancies. When it was beneficial to the interest of the developer, the DIBS period should follow the actual time and period that VP was delivered.

[37] However, as and when it was beneficial to the interest of the purchasers, the DIBS period should follow the 48 months' contract period stipulated under the SPAs. By the appellant's absurd and self-serving interpretation, the appellant should reap positive benefits in both instances

where the appellant performs dutifully and performs abysmally. We simply cannot condone the appellant's approbating and reprobating of its own stance.

[38] From the aspect of conduct of parties, it was certainly relevant to consider the appellant's conduct of continuing to service the progressive interests despite the lapsing of the 48 months' period together with the contemporaneous documentary evidence tendered into the court. That continued service and payment jives perfectly with the respondents' narrative that the parties have always understood and agreed that the DIBS period was not limited to the 48 months' contract period. (see Federal Court in *Tindok Besar Estate Sdn Bhd v. Tinjar Co* [1979] CLJU 119; [1979] 1 LNS 119; [1979] 2 MLJ 229):

> For myself, *I would with respect feel somewhat safer to refer to and rely on the acts and deeds of a witness which are contemporaneous with the event* and to draw the reasonable inferences from them than to believe his subsequent recollection or version of it, particularly if he is a witness with a purpose of his own to serve and if it did not account for the statements in his documents and writings. *Judicial reception of evidence requires that the oral evidence be critically tested against the whole of the other evidence and the circumstances of the case*. Plausibility should never be mistaken for veracity. (emphasis added)

[39] In the realm of estoppel, we are aware that both the parties were seeking to estop one another (*albeit* based on separate and distinct conducts). The appellant anchors estoppel on the respondents' conduct of reluctantly acceding to its claim for refund of 'overpaid' progressive interest while the respondents anchor estoppel on the appellant's unequivocal and voluntary continued payment of the progressive interest even after the lapsing of the 48 months' contract period.

[40] It is pertinent to note that the former was grounded on a position of inequity and coercion, while the latter was grounded on outright volition. As a trite and general rule, estoppel shall set in to restrain a party from negating the position that he or she by his or her conduct had agreed or subscribed to. One cannot blow both hot and cold (see *Boustead Trading (1985) Sdn Bhd v. Arab-Malaysian Merchant Bank Bhd* [1995] 4 CLJ 283; [1995] 3 MLJ 331; *Cheah Theam Kheng v. City Centre Sdn Bhd (In Liquidation) & Other Appeals* [2012] 2 CLJ 16; *Vila Mekar Sdn Bhd v. Wong Yie Dee* [2025] CLJU 1703; [2025] MLJU 2104; *Ho Yau Hong & Ors v. How Yaw Ming & Another Appeal* [2023] CLJU 827; [2023] 1 LNS 827; [2023] MLJU 933).

[41] Thus, it seems as though estoppel might as well apply in favour of (as well as in contradiction against) the respondents' case. This stalemate can be demystified by appropriately appreciating the true nature of estoppel as a remedy rooted in equity. And the trite and celebrated principle remains that he whosoever seeks equity, must do equity. In short, anyone seeking the

aid of equity must come with clean hands. Relevant to the appeal before us, the respondent-purchasers (who by default are with the lower bargaining power as against the developer) had not done anything to tilt the balance of power in a manner in which would 'force' the developer's hands to continue serving the progressive interest beyond the lapsing of the 48 months' contract period. The appellant had done so without any pressure or undue insistence of the respondents.

[42] On the contrary, the respondents were put in an inequitable position (and lower bargaining power) by the appellant's inequitable conduct in forcing additional late payment charges, and delayed physical possession of the units (despite the accrual of the DLP period) in which had cornered the respondents to accede to the appellant's claim for refund. The appellant had also acted inequitably by making a 'u-turn' against its own *status quo* which it had unequivocally and voluntarily subscribed to for five years before suddenly issuing the belated overpayment notice. (see Federal Court in *Cheng Chuan Development Sdn Bhd v. Ng Ah Hock* [1982] CLJU 48; [1982] 1 LNS 48; [1982] 2 MLJ 222).

> His argument on estoppel – of whatever description, whether estoppel in pais or promissory estoppel or quasi estoppel – could be negatively answered in *that estoppel being an equitable doctrine could only be invoked by a party who comes to court with clean hands*. The appellant must therefore show that it had anequity to enforce against the respondent. *According to the time-honoured maxim he who comes to equity must come with clean hands.*
>
> (emphasis added)

[43] Thus, we find that estoppel shall lie in the benefit of the respondents to bar the appellant from negating its previous admissions by conduct.

[44] For the sake of completion, we do not follow the appellant's argument that the LAD clause under Schedule H is a conclusive remedy clause in cases of delay by the developer. Firstly, the LAD as a remedy was entrenched within the SPA which was totally separate and distinct than that of the DIBS agreement. The respondents here were not seeking to enforce the SPA and instead was seeking to enforce the DIBS agreement. Secondly, the entitlement under the DIBS scheme was not attached to or predicated upon the developer's delay (unlike the LAD clause within the SPAs). Instead it was predicated on the entire period of time the developer took to complete the development and deliver VP to the respondents. It had accrued even before the developer had failed to adhere to the 48 months' contract period and continues to accrue until the time the appellant properly delivers VP to the respondents. It is patently obvious that the two distinct remedies under the SPAs and under the DIBS scheme was not at all of the same nature, purpose, and design.

[45] In view of all of the above deliberations under this heading, we accordingly answer the issue in the positive. We find that the learned judge is not plainly wrong to find that the appellant-developer was contractually required to bear progressive interest under the DIBS scheme up until the delivery of VP proper (beyond the 48 months' contract period in case of delays).

[46] All of the above deliberations considered, we find that there are no merits in the appeal and therefore, we hereby dismiss the appeal. The learned judge's decision to allow the respondents' claim is hereby affirmed.

[47] We also order total global costs of RM25,000 to be paid by the appellant to the respondents, subject to allocator.